FOR ARGUMENT

In the Supreme Court of the United States

OCTOBER TERM, 1979

No. 78-1557

NACHMAN CORPORATION,

Petitioner,

v.

PENSION BENEFIT GUARANTY CORPORATION and INTERNATIONAL UNION, UNITED AUTOMOBILE AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

REPLY BRIEF OF PETITIONER NACHMAN CORPORATION

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INTRODUCTION

The briefs of the respondents and General Motors Corporation ("GM"),[1] as amicus curiae, are based on a misconceived and myopic view of ERISA, on tortured grammatical discourse, and on a neglectful approach to the facts of this case.

Respondents, especially the PBGC, rely primarily on legislative history to the near exclusion of the language

[1] Unless otherwise indicated, this Reply Brief will employ the same acronyms and abbreviations used in the main Brief of petitioner.

of the statute itself. Although an examination of the congressional intent may be important in construing any statute, the inquiry should focus principally on the legislative scheme reflected in the final version of the Act, rather than on isolated committee or floor debates. *S&E Contractors* v. *United States,* 406 U.S. 1, 13 n.9 (1972)[2] Especially in the case of a statute as comprehensive as ERISA, which defines many of its critical terms and specifies its purposes, the legislative intent is clearly discernible from the face of the law.

That intent was to govern private pension plans by providing and funding certain mandatory minimum benefits ultimately to be insured by the PBGC. Just as Congress clearly intended thereby to increase the economic burden on employers, it intended to provide certain grace periods, which this court has recognized in two recent decisions.[3] The result sought by respondents and imposed by the court of appeals, however, would destroy the very balance sought by Congress in enacting ERISA, and would impose substantial retroactive liability despite the clear statutory language designed to avoid such an effect. The decision appealed from should be reversed.

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[2] In language equally applicable to the instant case, Mr. Justice Douglas in *S&E Contractors* noted that the legislative history of the Act there in question "has something for everyone." *Id.* See also, *Schwegmann Bros.* v. *Calvert Distillers Corp.,* 341 U.S. 384, 394 (1951) (Jackson, J., concurring: "Resort to legislative history is only justified where the face of the Act is inescapably ambiguous, and then I think we should not go beyond Committee reports. . . .")

[3] *Allied Structural Steel Co.* v. *Spannaus,* 438 U.S. 234, 249 (1978); *City of Los Angeles Dep. of Water* v. *Manhart,* 435 U.S. 702, 721 (1978). See also, *Malone* v. *White Motor Corporation,* ...... U.S. ...... (No. 79-349, October 15, 1979), summarily affirming 545 F.2d 599 (8th Cir. 1978).

ARGUMENT

I.

RESPONDENTS MISCONTRUE THE RELEVANT PROVISIONS OF ERISA AND THE NATURE OF THE REMEDIES SOUGHT BY NACHMAN.

A.

The Benefits at Issue Were Not Nonforfeitable Since They Were Conditioned Upon Sufficient Assets at Termination and Were Not Enforceable Against Nachman or the Plan.

PBGC guarantees only "nonforfeitable benefits . . . under the terms of the plan." (ERISA § 4022(a); 29 U.S.C. § 1322(a)) Upon termination of a plan, employers are liable to the PBGC only for such guaranteed benefits. (ERISA § 4062(b); 29 U.S.C. § 1362(b)) Thus, the central issue in this case is whether the benefits at issue are "nonforfeitable," a term defined by section 3(19) of ERISA, 29 U.S.C. § 1002(19)):[4]

> "The term 'nonforfeitable' when used with respect to a pension benefit or right means a claim obtained by a participant or his beneficiary to that part of an immediate or deferred benefit under a pension plan which arises from the participant's service, which is unconditional, and which is legally enforceable against the plan."

In their attempt to demonstrate how a benefit which is expressly conditioned upon sufficient plan assets remaining at termination can be labeled "unconditional" and "legally enforceable against the plan," respondents misconstrue the

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[4] Because the question of the validity of or deference to be afforded to the PBGC's own definition of nonforfeitable has been addressed at some length both by the parties (Nachman Brief pp. 18-21; UAW Brief pp. 11-14; PBGC Brief pp. 26-32) and the *amici* (Concord Control Brief pp. 24-34; GM Brief p. 21), Nachman will not readdress that subject in this Reply Brief, but will rely on the argument contained in its main brief and the amicus brief of Concord Control, Inc.

facts[5] and engage in grammatical gymnastics which defy comprehension. The syntactic exercise on page 15 of the UAW brief illustrates the futility of attempting to justify the court of appeals' conclusion that "unconditional" and "legally enforceable" modify the word "claim" rather than "benefit," and that the "claims" to benefits under the Nachman Plan were nonforfeitable despite the conditions imposed upon the receipt of benefits by the terms of the Plan. The UAW, and the court of appeals, conclude: "the question, then, is whether the *claim* is unconditional and enforceable against the Plan, *not* whether the benefit is so. The *claims* here clearly meet this test." (UAW Brief p. 15.) Similarly, the PBGC (at p. 34, n. 29) states:

> ". . . while we readily grant that 3(19) is not a model for draftsmanship, and thereby invites grammatical nitpicking, it is plain enough that the Court of Appeals' reading was correct, for, only a *claim* can be enforced; it makes little, if any sense, to speak of the benefit (or part of the benefit) as being 'enforceable'; so too, it is a 'claim' rather than a 'benefit' which is (or is not) subject to a condition."

This reasoning is fallacious for several important reasons. First, section 4022(a) of ERISA (29 U.S.C. § 1322(a)) provides that the PBGC insures nonforfeitable "benefits," not "claims." If the *benefit* is conditional or unenforceable, the PBGC does not insure it and the employer is not liable for its continued funding under ERISA § 4062(b). Second, section 3(19) defines "[t]he term 'nonforeitable' when used with respect to a pension *benefit* or right . . ." (emphasis added), an obvious reference to the rights insured by the PBGC.

Finally, the reasoning of the respondents and the court of appeals defies the ordinary meaning of the language employed by Congress. Indeed, both the UAW (at p. 16) and the

[5] Respondents' failure to address all the relevant terms of the Plan is discussed *infra*, at pp. 10-12.

PBGC (at p. 34) concede that something other than ordinary meaning of the words in question must be imposed for respondents to prevail. Perhaps this is the emergence of the "pension language" which respondents would have this Court devise. In any event, respondents have failed to set forth any convincing reason for doing such violence to the English language.

Under the statutory definition, therefore, the Nachman Plan benefits at issue, which were expressly conditioned on sufficient funding, were not "nonforfeitable," the PBGC was not required to insure them, and Nachman is not liable to the PBGC for the continued funding of the Plan which terminated prior to 1976, the date on which Nachman would have been required to provide a nonforfeitable benefit and undertake its funding. On this ground alone, the decision of the court of appeals should be reversed.

B.

This Court Should Reject the Respondents' Contention That the Various Titles of ERISA Should Be Viewed in a Vacuum.

In an attempt to divorce the liabilities imposed by Title IV from the grace periods provided by Titles I and II of ERISA, the respondents would have this Court construe each of these titles in a vacuum. For example, the PBGC premises much of its argument on the proposition that Titles I and II, which require plans to provide and fund nonforfeitable benefits, apply only to ongoing plans, while Title IV alone governs plans which did not continue past 1975. (PBGC Brief pp. 11-13.) Not only does this proposition ignore the general rule of statutory construction to view a statute as a whole[6] and the genesis of ERISA itself (discussed at Nachman Brief pp. 29-31), but it is simply incorrect. Titles I and II contain a number of requirements for plans regardless whether they were terminated prior to

[6] *Kokoszka* v. *Belford*, 417 U.S. 642, 650 (1974).

1976.[7] Moreover, the PBGC clearly insures benefits compelled under the new minimum vesting requirements of Titles I and II which took effect in 1976. (ERISA §§ 203(a), 29 U.S.C. §§ 1053(a), 1061(a)(2); IRC §§ 411(a)(2), 412(b)(3).)

The PBGC also argues (at p. 31) that because the House bill would have insured only the benefits required to have been nonforfeitable under the ERISA vesting schedules, and the final bill insured nonforfeitable benefits under the terms of a plan, Congress did not intend "to establish perfect congruence between Titles I and IV generally, or between the minimum vesting standards of § 203 and the benefits guaranteed in § 4022 [29 U.S.C. § 1322]." (PBGC Brief, p. 31 n. 26.) This argument is specious because the final version of ERISA merely provides insurance for *all* the nonforfeitable benefits under the vesting schedule contained in a plan, which schedule may be more generous than the *minimum* required by the statute. The PBGC, therefore, erroneously concludes that by departing from the language of the House bill Congress intended to insure benefits which were never promised, or required to be promised, by the plan.

Clearly, Congress intended to provide a cohesive statutory structure governing all pension plans in existence on the date of enactment of ERISA, September 2, 1974. The several titles of the statute logically and intentionally relate to each other and should not be viewed in a vacuum.

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[7] Indeed, the PBGC has taken the position that I.R.C. § 414(b), a provision of Title II, governs the liability of controlled groups for insolvent subsidiaries whose plans terminated before 1976. *PBGC* v. *Ouimet Corp.*, 470 F.Supp. 945 (D. Mass 1979). Further, the fiduciary duties, reporting and filing requirements of Title I (ERISA §§ 101-111) apply to all plans regardless of whether they were terminated.

C.

Respondents' Position Would Result in the Defeat of the Grace Periods Provided by Congress in Enacting ERISA.

Remarkably, neither the respondents nor GM addresses this Court's statements in *Allied Structural Steel Co.* v. *Spannaus, supra,* and *City of Los Angeles Dep.* v. *Manhart, supra,* which recognize the strong congressional intent to avoid the constitutional difficulties of imposing retroactively substantial economic burdens on employers. Although the court of appeals conceded that its interpretations of ERISA had just such a retroactive effect (Appendix to Petition p. 24), respondents would prefer to avoid discussing retroactivity under the guise of this Court's grant of certiorari limited to the interpretive issue. Only by interpreting the statute to avoid a retroactive effect, however, may the constitutional question be avoided.

In so attempting to evade this issue, respondents have failed to explain how the clear congressional intent to provide grace periods before plans were required to promise and fund nonforfeitable benefits can be honored by imposing liability immediately on employers such as Nachman, who terminated plans which *never* promised nonforfeitable benefits. Further, in arguing that Title IV imposed such liability by effecting the termination insurance provisions upon enactment, respondents fail to explain the fact that under ERISA § 4022(a), the PBGC was to insure, and employers were to be liable for only "nonforfeitable benefits . . . under the terms of the plan" —terms which were not required to be changed until 1976. There are no such explanations.

The PBGC's confusion over the fact that Title IV insurance became effective upon enactment in 1974 ignores the congressional intent to guarantee truly nonforfeitable benefits under plans which provided such benefits prior to 1976, the date they were required to do so. As discussed at pp. 14-15, *infra,* the PBGC properly provided some $20

million in insurance benefits for such plans which terminated during the grace period. Participants in those plans were thus provided an administrative structure from which to receive their promised benefits. When such plans terminated with insufficient funds, Congress put the burden of collecting the deficiency from the employer on the PBGC, rather than on the employees.

Preservation of the integrity of the congressional intent to insure only benefits promised or required to be promised under the terms of a plan compels reversal of the court of appeals' decision.

D.

The Amicus Brief of General Motors Is Based on the Incorrect Proposition That a Ruling in Nachman's Favor Would Necessarily Invalidate All Limitation of Employee Recourse Against the Employer After 1976.

GM's purported concern about this case is premised on the proposition that a holding by this Court for Nachman would necessarily compel a collateral holding that Titles I and II of ERISA preclude, after 1975, an employer from limiting in any way employees' recourse to plan assets at termination for benefits which exceed the benefits guaranteed by the PBGC. This proposition is not only incorrect, it attempts to pose a question that is not before this Court in the instant case.

The controversy between Nachman and the PBGC and UAW involves only the issue of whether, *before* the Plan was required to promise a nonforfeitable benefit, Nachman could terminate the Plan and be governed by its terms with respect to any obligations of continued funding. This case does not involve the validity of the various types of limitation of liability clauses, such as GM's, for plans which continued in existence after 1975. Although, by requiring that certain benefits become nonforfeitable, Titles I and II prevent the blanket type of liability clauses (like the one in

the Nachman Plan) which were permitted prior to 1976, the facts of this case and the numerous lower court decisions in cases similar to it do not present the issue of what type of limitation of liability clauses are allowable after that date.

In fact, the Internal Revenue Service has promulgated final regulations governing the very issue GM raises, agreeing with the position asserted by Nachman. The Internal Revenue Service concludes that a benefit which is conditioned upon sufficient plan assets on termination is not nonforfeitable:

> "Rights which are conditioned upon sufficiency of plan assets in the event of termination or partial termination are considered to be forfeitable because of such condition." I.R.C. Reg. § 1.411(a)-4(a), 26 C.F.R. § 1.411(a)(4).

Nevertheless, under the Internal Revenue Service regulation, a plan is expressly permitted to limit recourse to plan assets to the extent of PBGC coverage:

> "However, a plan does not violate the nonforfeitable requirements merely because of in the event of a termination an employee does not have any recourse towards satisfaction of his nonforfeitable benefits from any other than the plan assets or the Pension Benefit Guaranty Corporation." *Id.*

GM's position is, therefore, inaccurate and contradicted by the IRS regulations governing employer liability clauses. At most, GM's argument is premature and irrelevant to the instant case.[8]

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[8] GM also argues (at p. 11) that it might be exposed to considerable liability because ERISA § 4022(b)(3) (29 U.S.C. § 1322(b)(3)) places limits on the amount of PBGC insurance. Adjusted to recent increases in the cost of living, the maximum benefit insured by the PBGC is now $1,159.09 per month. This limit is more than ten times the $110 average monthly benefit currently being paid by the PBGC. PBGC News Release No. 80-3 (11/26/79), CCH Pension and Profit Sharing Guide ¶ 22,284. Of course, the benefits at issue in the Nachman plan are limited to $105 per month (Article II, as

II.

RESPONDENTS HAVE IGNORED OR MISSTATED THE MATERIAL FACTS OF THIS CASE.

A.

Respondents Have Ignored Critical Provisions of the Nachman Plan.

Much of the rationale of the respondents, their *amicus* and the court of appeals is premised upon a misconception of Nachman's position and the terms of the Plan. This misconception is illustrated by the following statement from the PBGC's brief (at p. 13):

> "Instead of focusing on plan terms which measure the claims participants had against the plan, Nachman asserts that plan terms which limit the liability of the employer are dispositive. It was to provide protection for employees notwithstanding those limitation of liability clauses that Congress enacted Title IV."

See also, UAW at p. 5.

As set forth in Nachman's main Brief, the PBGC would prefer to view the concept of nonforfeitability solely from the position of whether the employee had fulfilled all conditions required of him at plan termination, and ignore other conditions placed upon the benefits at issue. The respondents also, as illustrated above, argue that Article V, § 3 of the Plan (set forth on p. 5 of Nachman's Brief), which conditions payment of benefits on sufficiency of assets at Plan termination and precludes employer liability for any further contributions,

amended, App. 14-17, 46-52), well within the insurable amount. The congressional limitation on PBGC exposure—like the limitation of employer exposure to 30% of net worth and the delayed effective dates of the minimum vesting and funding requirements—reflects the balancing of employer and employee interests which permeates the legislative scheme underlying ERISA. The fact that the maximum insurance appears to be sufficient to protect all but the highest paid participants demonstrates the wisdom of that legislative scheme, and the irrelevance of GM's argument.

does not prevent the benefits from being "nonforfeitable" since, under the statutory definition of section 3(19), the benefits or claims are purportedly "unconditional" and "legally enforceable against the *plan*." These benefits, respondents argue, are merely "uncollectible" against the *employer*.

Respondents' reasoning is fallacious since it ignores those provisions of the Plan which allowed the Plan to be terminated by either party upon certain conditions which were met in the instant case, which allowed amendments to comply with changes in the law, but which expressly provided that no such amendments could affect, either to increase or to decrease, the amount of contributions to the Plan.[9] These provisions demonstrate the clear intent of the employees as well as Nachman to seek benefits only from the assets of the Plan at termination, and to condition any recovery on the sufficiency of assets to the various categories of benefits contained in the Plan.

The court of appeals' opinion and respondents' arguments, except for a passing footnote reference by the PBGC, also ignore Article X of the Plan, which governs termination. (App. 32-33; discussed at Nachman Brief pp. 24-25.) Section 3 of that Article specifically provides that the Board of Administration of the Plan shall allocate funds to the various categories of benefits (based on employee age and seniority) only to the extent such funds exist at termination. If benefits for a given category are not fully funded, they are distributed pro rata only "to the extent that [the assets] shall be sufficient." Thus, Article X demonstrates that the unfunded

[9] Articles VII, § 5 (App. 23), Article IX, § 1(b) (App. 31), and Article X, §§ 1, 2 (App. 31, 52).

benefits were unenforceable against the *Plan*, as well as against the employer.[10]

When viewed as a whole, as it must be, the agreement between Nachman and the UAW, as expressed in the Plan, evidences no intention to provide nonforfeitable benefits in excess of plan funds, for no such promise was ever made. The PBGC, therefore, did not insure, and Nachman cannot be liable for, the payment of such benefits.

B.

Respondents Misstate the Nature of the Contractual Agreement Establishing the Plan at Issue.

Respondents would have this Court believe that Nachman unilaterally promised illusory pension benefits to its employees. Much of their argument appeals to the Court's sense of fairness in preventing the loss of "expected" benefits.

This reasoning is most startling coming from the UAW, which intervened in this action precisely because, as the union representing Nachman's employees, it is "a party and

[10] The PBGC attempts to meet this issue, by asserting (at p. 35, n. 30) that Article X, § 3 "was a dead letter" immediately upon enactment of ERISA, since section 4044(a) of Title IV (29 U.S.C. § 1344(a)) governed allocation of assets upon termination. The PBGC is wrong. Article X of the Plan is not inconsistent with section 4044(a). Section 4044 provides for the allocation of plan assets upon termination generally: first, to pay benefits already in pay status; second, to pay benefits which would have been in pay status had a participant retired prior to plan termination; and finally, to pay all other nonforfeitable benefits. The purpose of this provision is to ensure that plan assets are used first to pay benefits for which the PBGC otherwise would be liable.

Allocation of plan assets in accordance with Article X of the Nachman Plan results in the same priority of payments as section 4044 mandates. The Plan merely divides allocation categories by age, which is expressly authorized by the regulations. 29 C.F.R. § 2608.4. Moreover, the provisions of Article X allocating insufficient assets pro rata within a given category is expressly mandated by ERISA section 4044(b)(2).

Thus, Article X of the Plan complies with, rather than violates, the sections of ERISA which became effective upon enactment, and compels the conclusion that the benefits at issue were not, and were never intended to be enforceable against the *plan* on the date of termination.

signatory" to the Nachman Plan.[11] Since Nachman's employees—and their expectations—must be viewed through their collective bargaining agent, the contention of unfairness sounded by the UAW and its recent bargaining partner, General Motors, is indeed curious.

The benefits at issue were the result of collective bargaining by parties of equal strength for a package of wage and non-wage benefits. While the employer is most concerned with the total cost of such a package, it is the union which makes the primary decision concerning the mixture of wages and other non-wage compensation such as pension benefits. To the extent Congress intended to impose a minimum level of pension benefits for employees, its actions thus reflected a disappointment with the performance of the unions representing the employees at least as much as with the employers. In any event, by providing the grace periods which govern the disposition of this case, Congress recognized the balance which had to be drawn in fairness to both employer and employee.[12] It is that very balance which Nachman requests this Court to honor by reversing the decision below which imposes a substantial retroactive burden on the employer.

[11] Memorandum opinion of District Court granting UAW petition to intervene. App. 63.

[12] Thus, as the Senate Labor and Public Welfare Committee stated, delayed effective dates were provided to allow time for pension plans "to adjust to the new vesting and funding standards, to make provisions for additional costs which may be experienced, and to permit negotiated agreements to transpire." S. Rep. No. 93-127, 93d Cong., 1st Sess. 22 (1973).

C.

Respondents Incorrectly Imply that All or Nearly All Plans Which Terminated Prior to 1976 Contain Clauses Limiting Benefits to Plan Assets at Termination.

Respondents argue that the provisions of Title IV which provided termination insurance upon enactment of ERISA would be rendered meaningless by adoption of the district court's and Nachman's position that the terms of the Nachman Plan allow termination prior to 1976 without further employer liability. This position is based upon the assertion that such terms were "standard" and almost universal in private pension plans prior to the enactment of ERISA. (See PBGC Brief p. 16, UAW Brief p. 9-10.)

That assertion of fact is contradicted, however, by the PBGC's own affidavit filed in the district court (App. 70-74), which states that 43% of the 136 plans which terminated between September 2, 1974 and January 1, 1976 contained no limitation of liability provisions such as those at issue in the instant case. The PBGC as required by ERISA, insured the benefits provided by those plans since those benefits—as contrasted with those provided by the Nachman Plan—were indeed "nonforfeitable . . . under the terms of the plan." (ERISA § 4022(a); 29 U.S.C. 1322(a))

Thus, according to the PBGC's own affidavit, it provided almost $20 million in pension insurance of nonforfeitable benefits between the dates of enactment of ERISA and the effective date of the minimum funding and vesting requirements of Titles I and II. This can hardly be described as "a minuscule class of cases" (UAW Brief p. 10), or an emasculated or meaningless mandate to the PBGC. The very facts which the PBGC brought before the district court in this case, therefore, demonstrate the wisdom and purpose behind the grace periods provided by Congress simultaneously with the immediate institution of PBGC termination insurance program.

Respondents also argue that Nachman's position renders the system meaningless during the grace period since that position results in the PBGC's insuring and paying benefits for which the employer is already contractually liable. This argument ignores two important aspects of the legislative scheme: (1) in the event the employer who promised nonforfeitable benefits was insolvent or in financial distress, the employees, during the grace period, had recourse to the PBGC; and (2) even where the employer was solvent, Title IV provided an accessible, inexpensive method for individual participants to collect their promised benefits if the plan terminated with insufficient funds without having to sue their employer or experience delay in collecting their retirement income—that task was left to the PBGC.

CONCLUSION

The Congressional purpose should be given effect by this Court in reversing the decision of the court of appeals and holding that Nachman is not liable for continued funding, and the PBGC is not liable to insure, the benefits at issue in this case.

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